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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 938

MRS. WALTER LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS OF BOLIVAR COUNTY, MISSISSIPPI ..... *Petitioner*

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF LEWIS, PETITIONER, TO KENNEDY'S BRIEF OPPOSING THE WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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MAY IT PLEASE THE COURT:

Throughout this Petitioner's reply to Respondent's brief in opposition to the issuance of the writ of certiorari, we will follow the same course adopted in our petition when we refer to Title III of the 1960 Civil Rights Act and any section thereof which consists of Section 301-306; said Title III is compiled as 42 USCA, Sections 1974, 1974a-e; in the petition (p. 14-15), the sections of said Act were correlated to the compilation thereof; reference to Title III will mean that Title of said Act; reference to any Section 301-306, inclusive, will mean that section of said Title of said Act and the corresponding section of the compilation; when a section

of the compilation is referred to, it will also mean the corresponding section of said Title III.

All emphasis in any quotation is supplied by Petitioner, unless otherwise stated.

GENERAL OBSERVATIONS UPON RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

A careful analysis of Respondent's brief in opposition does not disclose anything which should prevent the issuance of the writ. In fact, the contents of the reply — that part which does not deal with matters which are not even in this case — actually support Lewis's contentions that the writ should issue. The petition has fully covered and dealt with the matters which go to the heart of the question of whether this writ shall issue. Before taking up the various portions of the brief in opposition, there are certain matters which should be brought to the attention of the Court.

The petition asserted that all of the legislative history and the plain and clear language of Title III of the 1960 Civil Rights Act, 1974, 1974a-e, authorizes, by 1974d, this suit to be brought against Lewis. She is the sole defendant; she is the one who Title III and especially 1974d says is to be sued. The United States is not and never has been and cannot be a party-plaintiff in any suit brought under 1974d. Lewis is the only person who can be made a defendant thereto. Unquestionably, whenever any statute authorizes a suit to be brought against a person, and that person must be given *notice of the hearing* and is summoned to court in a judicial proceeding, a case or controversy, *then that person irrespective of who she is or what her relationship* to the subject matter of the suit may be is fully

authorized to defend the action and has a right to her day in court and to make full defense; and no valid judgment or order can be issued against that defendant unless the plaintiff proves his case by competent evidence.

Under these circumstances, the right of petitioner is inherent and implicit in her liability to be sued.

Therefore, the various claims by plaintiff, respondent here, that Lewis does not have all of the full rights of any defendant in any suit are totally unsound and without merit.

The position and contentions of Lewis is that under Title III she has all of the foregoing rights.

If any of said inherent rights are denied her, then she is also deprived of her rights under the due process of law clause of the Fifth Amendment to the United States Constitution. The due process clause is a limitation upon both the judiciary, legislative and executive. It is contrary to common reason and especially judicial processes to say that even though due process is a limitation upon legislation, a limitation upon the executive and a limitation upon the judiciary, still merely Lewis is the registrar, she does not have the full benefit of the protection of due process of law. The limitations above referred to act and apply even though there is then no existing case and no party defendant to any suit.

The Court will notice that Lewis's petition asserted that the Federal Rules of Civil Procedure applied to the proceedings had in the District Court giving Lewis all of the benefits thereof as any other party defendant —the Court will further notice that Respondent's brief in opposition does not controvert this — do they thereby

admit the correctness of Lewis's assertions — no other reasonable conclusion could be drawn.

Both parties in the District Court used and followed the Federal Rules of Civil Procedure. Respondent did not seek or move to strike any document filed by Lewis in accordance with said Federal Rules of Civil Procedure. All parties adopted this course.

In the Court Below, since both parties followed the Federal Rules of Civil Procedure and adopted them as governing and controlling the procedure, It does not lie in the mouth of Respondent to now deny that they do apply. There is nothing in said Title III which prohibits them. The petition heretofore filed herein clearly shown how and why they do apply.

The constitutional question raised by Lewis, as is apparent from the petition heretofore filed herein, is thus:

If the true meaning and legislative history of 1974d and the remainder of said Title III does not give Lewis the full rights and benefits of any ordinary and usual defendant in any other case, then to that extent 1974d and any other portion of Title III which deny her those rights or contributes to the denial to her of those rights are likewise violative of her rights to due process of law.

The Court may avoid the consfitational question by accepting the meaning of 1974d as we have stated it in the petition for certiorari and which is backed up and supported not only by the clear terminology but all of the authoritative legislative history which is clearly set out in the petition.

AS LEWIS, UNDER 1974d AND EVEN THE HOLDING IN KENNEDY VS. LYND, 306 F. 2d 222, THE CASE AT BAR, IS ENTITLED TO HAVE

NOTICE SERVED UPON HER IN THIS CASE SHE MUST BE GRANTED THE FULL RIGHT TO A HEARING AND ALL RIGHTS OF ANY OTHER DEFENDANT IN ANY OTHER CASE.

According to the opinion of the Fifth Circuit in *Kennedy vs. Lynd*, Lewis must have had notice served upon her in the 1974d proceeding; that is a necessary element which must be complied with according to *Kennedy vs. Lynd*. In such an instance, then she must be given the full rights to defend and assert everything that any other defendant could assert in any other case. This is squarely held by the line of decisions represented by the case of *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, 915-918.

In *Windsor*, suit was brought to condemn certain property of a person who lived within Richmond within the Confederate lines who was a Rebel. The proceeding was brought under an Act of Congress of July 17, 1862, 12 Stat. at L. 589, entitled "To Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels and For Other Purposes". Notice was served and the defendant filed his answer. On motion of the plaintiff, the answer of the defendant was stricken from the file and then a judgment by default was rendered. An appeal was taken to the U. S. Supreme Court. The Court reversed the holding of the Lower Court and held that any person against whom a suit is authorized to be brought has an *implicit and inherent right* to defend it with all of the accoutrements of defense authorized by law; and further held that whenever any person was entitled to notice in any case, then he is entitled to make answer and be heard and require the adverse party to prove his charges. The Court further held that if the party who is required to be

given notice, the defendant, is not heard, then the notice is ineffectual and the Court loses its jurisdiction.

The Court, speaking through Mr. Justice Field at page 915 of the Law Edition Report quoting from the case of *McVeigh vs. U. S.*, 11 Wall. 267, XX L. Ed. 81, says:

> "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no locus standi in that forum. If assailed there, he could defend there. *The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and the right administration of justice.*"

Speaking further at page 916 of the Law Edition Report, Justice Field, for the Court, said:

> "The law is, and always has been, that wherever notice or citation is required, the party cited has the right to appear and be heard; *and when the latter is denied, the former is ineffectual for any purpose.*"

Lewis got the same treatment from the District Court and from the Fifth Circuit as did Windsor in the above case. Windsor's answer was stricken — Lewis's answer was not stricken, but the District Court followed *Kennedy vs. Lynd*, supra, and held that Respondent was entitled to the order for production of the documents and that Lewis could not be heard to defend herself and could not require plaintiff to prove his case and could not challenge or litigate or disprove the factual foundation for or the legal sufficiency of the reasons assigned by Respondent as entitling him to an order from the District Court making Lewis do what she otherwise did not have to do.

In common sense and honesty, the inevitable result and effect of the decision of the Courts Below is that they amount only *to an arbitrary sovereign edict*. The judgments and opinions of the Lower Courts in Lewis amount to no more and no less than the Courts rendered a judgment against Lewis without having heard and without having seen — *judicial judgment and decision cannot, under all and the fundamental law of this Nation, be an exercise of the judicial function under such circumstances.* Such decisions do not nurture or create respect and confidence of the people.

Windsor is squarely followed in the case of *Horen vs. Elliot*, 167 U. S. 409; 42 L. Ed. 215.

The Court in *Horen*, speaking through Justice White, says at page 415 of the U. S. Report, page 220 of the Law Edition Report, with reference to notice and the right to be heard:

> "Until notice is given the court has no jurisdiction in any case to proceed by judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to the party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. *It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard.*"

In Hovey, supra, at page 418 of the U. S. Report and 221 of the Law Edition Report says through Justice White in quoting from *Ex parte Wall*, 107 U. S. 289, 27 L. Ed. 562:

"Again, in Ex parte Wall, 107 U. S. 289 (27:562), the court quoted with approval the observations as to due process of law made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

"'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case, 17 U. S. 4 Wheat 518 (4:629): by the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society'.

"'And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: '*The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry', and 'render judgment only after trial.*'"

The foregoing is, we submit, a total, complete and all-enveloping answer to any and all things contained in *Kennedy vs. Lynd, Kennedy vs. Owen*, 321 F. 2d 116, in Respondent's brief in opposition to the issuance of the writ of certiorari and wholly and totally sustains all claims made by Lewis that the Lower Courts erred in granting any relief to Respondent, Kennedy.

The foregoing should also, in our humble judgment, persuade this Court that the writ of certiorari should promptly issue and this case brought before this Honorable Court in an orderly fashion and there hear the matter in full upon Record and proper briefs.

We will now briefly take up each of the different sections of Respondent's brief in opposition and show that nothing therein contained should prevent the issuance of the writ of certiorari and, in fact, said brief in opposition is not correct in many of its statements, unintentionally made we are sure, and does not properly reflect the contents of the Record. The brief in opposition seeks, improperly we think, to push this case away from the 1974d proceedings and seeks to make this case one upon the 1974b demand or request for the records.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI EVIDENCES, WE THINK, EITHER A MISUNDERSTANDING OR DISREGARD OF THE DIFFERENCE BETWEEN THIS 1974d CASE FILED IN THE DISTRICT COURT BELOW BY RESPONDENT, PLAINTIFF BELOW, AND THE REQUEST OR DEMAND MADE BY RESPONDENT UNDER 1974b UPON DEFENDANT BELOW, LEWIS; SUCH MISUNDERSTANDING OR DISREGARD BY RESPONDENT HAS LEAD TO INACCURATE AND INCORRECT STATEMENTS IN RESPONDENT'S BRIEF IN OPPOSITION.

No proper solution of the questions in this case on this petition can be reached unless the difference and distinction between the 1974d case or suit, a judicial proceeding, filed by Respondent, plaintiff below, in the

U. S. District Court, and the request or demand made under 1974b by Respondent upon Petitioner is clearly recognized and understood. Said suit was begun by a complaint filed by Plaintiff below setting out conclusionarily the reasons why he alleged he was entitled to an order of the District Court to compel Petitioner to commit an affirmative act; that affirmative act was to force her to make available to Plaintiff below the voter records involved in this case — to commit an act which she was under no duty whatever to perform in the absence of an order of the District Court commanding her so to do.

The request or demand made by Respondent, plaintiff below, upon Lewis, Petitioner, under Section 1974b, seeking permission from her to inspect, reproduce and copy the voting records involved in this case, was and is solely and alone an administrative act of an executive officer. It created no duty or obligation of any kind upon Lewis to comply therewith. Upon her denial of Plaintiff's request, that request — its making and its denial — ended the administrative act — it became as such functus officio. Such demand or request did not and does not create any justiciable issue or any issue of any kind between Petitioner and Respondent.

The fact that Petitioner, plaintiff below, chose to allege in his 1974d complaint as his reasons why he was entitled to the court order the same words which he set out in his letter of request or demand under Section 303, 1974b, *does not and cannot make* the 1974d case or controversy, the judicial proceeding, *into an administrative act.* If it should make the 1974d proceedings into an administrative or investigatory proceeding, then the District Court would not have jurisdiction of a 1974d proceeding because Article III, Section

2 of the Constitution of the United States, restricts the jurisdiction of Federal Courts to cases and controversies. Respondent himself says the 1974d suit is a case or controversy — he had to.

In view of the foregoing, it is clear that the 1974d complaint in a case or controversy remains a judicial proceeding irrespective of where the language alleged in the complaint came from, and irrespective of where or in what such language had been used. When Lewis denied the request of Respondent, plaintiff below, he had no further power or authority to secure those records in or by virtue of himself or his office.

The only thing which could get the records for him was an order of the District Court, and which can only be made in a case or controversy.

We emphasize the foregoing because we believe Respondent's mistaken understanding of 1974b and 1974d of said Title III; or his having ignored that difference, has caused him to erroneously and improperly assert that Petitioner is attacking the demand or request made under 1974b, *or to say that said demand or request itself as such is involved in the case at Bar*., if so he says.

Respondent's misunderstanding or lack of understanding or disregard of the difference and distinction between the demand under 1974b and the case or controversy commenced by his complaint under Section 305; 1974d, is, we believe, the reason *why he has erroneously and mistakenly said in his statement of the "questions presented", page 2 of his brief, that 1974b is involved in this case.*

With 1974b removed from the brief in opposition much, if not most of it, collapses.

RESPONDENT'S RECOGNITION, ASSERTION, OR ADMISSION THAT HE AND HIS PREDECESSOR ATTORNEY GENERAL HAD NO POWER OR AUTHORITY TO ADJUDICATE ANYTHING ABOUT ANYTHING OR MATTER IN OR ABOUT OR CONNECTED WITH THIS CASE, IS MOST SIGNIFICANT; SUCH LACK OF POWER TO ADJUDICATE SHOWS CONCLUSIVELY THAT PETITIONER, LEWIS, IS CORRECT IN HER CONTENTION THAT NO RELIEF SHOULD HAVE BEEN GRANTED TO RESPONDENT BY ANY COURT.

At page 9 of his brief in opposition, first two lines, Respondent recognizes, and asserts and admits that neither he nor his predecessor Attorney General has any power to adjudicate anything about anything in this case. Respondent's language is: "Indeed, the Attorney General has no power to adjudicate; * * *."

We congratulate Respondent upon his candid statement of his and his predecessor's lack of power or authority to adjudicate anything about anything in connection with this case under the contents of this Record in view of *Hannah vs. Larche*, 363 U. S. 420, 4 L. Ed. 2d and cases therein cited.

Furthermore, such lack of power or authority to adjudicate anything about anything in this case, leaves the allegations of Respondent's unsworn, unverified 1974d complaint in the District Court stating the reasons why he was entitled to an order of the District Court commanding Lewis to make said records available for production, inspection and copying *no more than mere allegations* — it was not supported by any affidavits or sworn statements — with no more force and effect

than mere allegations which had to be proven by competent evidence in open court subject to counter-evidence which Lewis had a right to adduce and would have adduced, if necessary, in contradiction of Respondent's evidence pursuant to her denials of said reasons in her answer to the complaint filed in this cause. Lewis did not waive Respondent's obligation to adduce evidence to prove his allegations or meet the requirements stated at page 29, paragraph 1 of Lewis's petition; Lewis did not waive her right to introduce counter-evidence.

Respondent failed and refused to even offer evidence when given the opportunity so to do. The order of the District Court was therefore violative of the due process clause of said Fifth Amendment to the U. S. Constitution. *Thompson vs. City of Louisville*, 366 U. S. 199, 206, 4 L. E. 2d 654, 659 and cases cited in fn 13, p. 659.

Lewis was erroneously denied her *inherent and implicit* right as a defendant to defend herself against Respondent's charges made in a proceeding under 1974d which *permitted her and her alone* to be made the sole party-defendant. *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Hovey vs. Elliot*, 167 U. S. 409, 413-419, 42 L. Ed. 215, 219-221 and other cases in this line of authorities.

In addition, this also violated Lewis's right of due process of law in that, among other things, it deprived her of her freedom of restraint from an order of a Federal District Court which commanded her to do an act which she was not otherwise obligated to do without giving her a day in court, a right to be heard, and without the right to require the plaintiff to prove his case and the right to cross-examine the witnesses and any documentary evidence which he should have offered.

LEWIS'S REPLY TO RESPONDENT'S STATEMENT OF "QUESTIONS PRESENTED".

No attack is made upon Section 1974b in this case and same is not involved herein so, therefore, any reference to or mention of any request or demand made under that section should not be included in the statement of any questions. Our statements above apply to all three of the questions as stated by Respondent.

Taking said questions *with everything about 1974b and a demand out of them*, it appears to us that Respondent seeks to inject into the remainder thereof something about a motion for a more definite statement — if this he does, then that, too, should be eliminated from the questions because the motion for a more definite statement once granted, but later denied, is not involved in this 1974d case in any respect whatever.

Considering said questions after the elimination of the two foregoing matters, they are not clear to us but, on the other hand, are abstruse.

Without attempting to parse them, Petitioner, Lewis, says that what she is contending in this case is that as clearly and definitely stated in her petition for certiorari in those portions thereof entitled "Statement of the Case", (P. 11-22) "Questions Presented", (P. 7-9) both as supplemented by her introductory statement (P. 2-5; statement and argument under the heading of "Reasons for the Issuance of the Writ"; (P. 22-52) and that plaintiff below, Respondent here, should have been required to prove the allegations of his complaint, stating the reasons why he was entitled to have the District Court enter or issue an order requiring the production of the documents referred to or that he must have alleged and proven to the satisfaction of the Court in the light

of any contradictory evidence adduced by Petitioner that he had reasonable grounds for believing that certain voters are being discriminatorily denied their voting rights in Bolivar County, Mississippi, or, as same is otherwise stated at paragraph 1, page 29, of Lewis's petition for certiorari; and that Lewis should have been granted the right to her day in court, a full hearing upon the complaint with full right to adduce evidence and cross-examine any evidence or witnesses adduced by plaintiff.

When thoughtfully considered and properly analyzed, Lewis has not and does not now contend that plaintiff below, Respondent here, had to allege and prove in fact a violation of Title 42, 1971a or 1971b, or both.

Lewis further says that her motion to dismiss the complaint for failure to state a claim (R. 65) and her motion for the entry of a decree in her favor (R. 150) should have been granted when plaintiff failed and refused to put on evidence to prove his said allegations which the Court said meant that plaintiff was taking the position of making a request for a judgment on the pleadings.

Lewis's reply to that portion of the brief in opposition entitled "Statement".

The foregoing section of the brief in opposition appears at pages 4-6, inclusive. There are a good many inadequacies and insufficiencies and, in fact, some incorrect statements in this portion of Respondent's brief.

Reference is made to a motion for a more definite statement — as heretofore stated, that is not involved in this case before this Court in any respect and should be disregarded.

Respondent *failed to include in his said statement that in her answer, Lewis denied in detail the allegations of the complaint whereby Respondent, plaintiff below, alleged the reasons why he was entitled to an order from the District Court requiring production of the documents involved — Respondent fails to mention that those denials were made.* The allegations of the complaint of said reasons and Lewis's denials thereof appear in quoted form at pages 16 (reference to them is here made by identification) and at pages 17 and 18 of Lewis's petition for certiorari.

Respondent's omission of any mention of Lewis's denials of the aforesaid reasons alleged in Respondent's complaint below causes his "Statement" to apparently erroneously negate the fact that Lewis did make said denials, that issues of fact were made thereby, that she was never given an opportunity to prove her denials; also, the omission of reference to Lewis's denials could be taken, from Respondent's "Statement" to show that there were no allegations in the complaint which, under the pleadings, *Respondent should have proven by competent evidence.* Taking Respondent's "Statement" at its face value, it would indicate that the case went off in the District Court solely on the motions actually mentioned by Respondent in his said "Statement" — his failure to mention Lewis's motion for a decree as above mentioned would, if the "Statement" is taken at face value, indicate that no such motion had ever been made.

There is no explanation in Respondent's "Statement" that such motions of Petitioner as he did mention were overruled by the Court solely because he followed *Kennedy v. Ingid* — with which he said, however, *he did not personally agree but felt bound thereby* — Respondent could more properly have said that said motions

were overruled on the basis of *Lynd* and that the merits thereof were not passed upon because *Lynd* held that Lewis could not test the legal sufficiency of the said reasons alleged in the complaint as aforesaid.

We *regret* Respondent's assertions in his "Statement" about the motion for a more definite statement when that is not involved in this case at all and, furthermore, we are forced to say that we disagree in fact with Respondent's statement that the U. S. District Judge Clayton *did not set or agree to set* Respondent's motion to reconsider the Court's ruling on the motion for a more definite statement until Respondent had filed a petition for a mandamus — such a statement is totally disproved by a letter from Judge Clayton addressed to Burke Marshall, of the Department of Justice, dated June 8, 1962, a copy of which was attached to the answer and supporting brief of Judge Clayton in said mandamus proceeding and thereby Judge Clayton shows that he had agreed to a setting of said motion to reconsider with the U. S. Attorney Ray some while before the filing of the petition for mandamus and that Judge Clayton understood from Ray it had been mentioned to and was agreeable with Mr. Marshall. Out of fairness of Judge Clayton, this letter is made Appendix A to this. Lewis's reply, and it speaks for itself; the order referred to by Respondent (R. 129) is predicated upon that letter and nothing was added to or subtracted from it by the conference of attorneys suggested by the sitting panel of the Fifth Circuit with Judge Rives presiding when the panel had read Judge Clayton's letter.

We submit that Petitioner's said statement of the case supplemented as aforesaid constitutes a correct statement thereof and covers everything involved in this case before this Court.

LEWIS'S REPLY TO RESPONDENT'S "ARGUMENT".

This portion of the brief in opposition covers pages 6-10, thereof.

Lewis's petition for certiorari consisting of her argument and presentation of the "Reasons for the Issuance of the Writ", pages 22-52, inclusive, fully answers all assertions made by Respondent in this section of his brief but thereasto Lewis says also:

There is no substance to Respondent's assertions about Title III giving him "ready access to state voter records in order to prevent denial of the right to vote based on race". The legal question and point always involved in statutory construction is what did Congress provide for in clear and unequivocable terms — Section 1974d contains everything in Title III which Respondent could make use of in securing voter records. We have fully discussed it in the petition and in this reply.

Respondent tries to make something out of what he called "delay", but a fotal and sufficient answer to that is that the Fifth Circuit or its Chief Judge, Tuttle, *granted Respondent a stay in this case before this Court*, the terms of which have been complied with so that this Court may determine or decide this petition for a writ of certiorari in an orderly manner — certainly Judge Tuttle did not think that Respondent had been unduly delayed or, in fact, delayed in the trial of this case because otherwise he would not have added to that delay by granting the stay. Furthermore, the stay is significant in that it demonstrates that Judge Tuttle thinks there is much substance to the contentions made by Petitioner and that this is a case in which he thinks the Bench

and Bar would benefit by a decision upon the merits hereof.

At sub-section 1 of Respondent's "Argument", page 6 of the brief in opposition, Respondent seeks to bring in 1974b again, even though he knows or should know that it is not and never has been involved in this case before this Court upon this petition for certiorari; at this point in Respondent's "Argument", he seeks to say what we assert under and in connection with 1974d — we are not clear exactly what Respondent means by these assertions, but Lewis says she asserts that under 1974d, she is entitled to have Respondent prove in open court by competent evidence, as in the ordinary civil case in a U. S. District Court, the allegations of his complaint — together with the other matters and under the conditions and with the rights as heretofore set out in Lewis's petition for certiorari and referred to in her petition herein (See also p. 29 of the petition). If Respondent will check his own allegations in his complaint, he will see what we say should be proved; or that he should prove what we set out at page 29 of the petition for certiorari; Lewis also says that she should have all of the rights incident to her defense under the Federal Rules of Civil Procedure.

Respondent speaks of 1974d proceedings being of "summary nature". We have fully answered this in the petition for certiorari, both by demonstrating that there is nothing summary about it, either by the terms of the Act or the legislative history. But, in any event, insofar as due process is concerned, *summary proceedings require the observance of both substantive and procedural due process as shown by the following cases:*

Bradley vs. St. Louis Terminal Warehouse Co., 189 F. 2d 818, 824; *Hicklin vs. Edwards*, 226 F. 2d 410.

413; *In re Central Railway Co. of New Jersey*, 136 F. 2d 633, 639; *Commissioner of Internal Revenue vs. Bain Peanut Co. of Texas*, 134 F. 2d 853, 858, 859 (5 Cir. 1943).

Here again, Respondent refers to 1974b and as we have repeatedly said that statute is not involved in this case before this Court in any shape, form or fashion so what it does or does not do is totally immaterial.

At page 7 of his brief in opposition under the section "Argument", Respondent refers to several cases from the Fifth Circuit, all of which deal with Title III except *U. S. vs. Lynd*, 301 F. 2d 818, which was a Title 42, U. S. C., 1971a case.

As to all of the other cases, we say unequivocably that none of them presented the factual pleading or record aspects of Title III as are contained in *Kennedy vs. Lewis* now before this Court. *Again, please let us say that the denial of certiorari means nothing insofar as determining the correctness or incorrectness of the decisions of the Court Below.* This Court has the records of all cases mentioned by Respondent in which certiorari was denied. Among the differences are:

In *Kennedy vs. Lynd*, 306 F. 2d 222, 226 (C.A. 5), cert. den. 371 U. S. 952, as Respondent knows the records involved had actually been inspected, reproduced and copied before the petition for certiorari was filed so, therefore, that petition was mooted before ever being presented.

Likewise, *Dinkins vs. Attorney General* (Ala. ex rel Gallion vs. Rogers) 187 F. Supp. 848, cert. den. 366 U. S. 913, the records had been inspected, reproduced and copied before the petition for certiorari was filed — see page 4, paragraph 3 of the petition for certiorari in

that case, being No. 823 at the October, 1960, Term of this Court. Thus, "mooting" the petition before the case was presented to this Court.

Also, in Crum Dinkins, the record shows at page 54 and 55 that both plaintiff and defendant said they had no evidence to offer — nothing like that was said by Lewis in this case before this Court.

In *Coleman vs. Kennedy*, 313 F. 2d 867 (CA 5), cert. den. 373 U. S. 950, the printed record shows at page 77 that both parties did not wish to offer any testimony — Lewis never made any such statement in the case at Bar — in fact, she preserved her right to offer evidence.

In sub-section 2 of page 7 of the brief in opposition, Respondent again mentions Section 1974b which is not in this suit.

At pages 7 and 8, Respondent asserts what he says Lewis requires the Respondent to "disclose" — we merely refer to other portions of this reply and our statements in the petition for certiorari as to what plaintiff must allege and prove — and, incidentally, which is not what Respondent says on this point in his brief.

At paragraph 1, page 8, of the brief in opposition, Respondent says to that the United States surely has the right to inspect and copy these official records pursuant to statutory authorization without a full trial of the need for the records — in response to this, we repeat as we have previously said, that the United States is not and cannot become a party to a 1974d proceeding — the Attorney General is the only party — he is not the United States — never has been and, I assume, never will be — *again, we say that Lewis does not assert* that there must be a "full trial of the

need for the records"—the "need" as such for the records is totally immaterial—though we are not sure what "full trial" means, but I think the gentleman is trying to say that Lewis asserts that before the records can be seen or an order secured for their inspection, Respondent must prove a violation of Title 42, 1971a or 1971b, or both — if so, that is not what Lewis contends — her contentions have been heretofore fully and too frequently mentioned.

By Respondent's asserted recognition, as he must recognize, that the Attorney General has no power or authority to adjudicate anything about anything in this suit, that takes the case of *Hannah vs. Larche*, 363 U. S. 420, entirely out of the case at Bar.

We violently disagree with both the intimation or assertion. A 1974d proceeding is an investigatory proceeding instead of a case or controversy — a judicial proceeding.

At page 9 of the brief in opposition, paragraph 1, Respondent refers to the cases of *Wilson vs. U. S.*, 221 U. S. 361, 380, and *U. S. vs. White*, 322 U. S. 694, as authority for his assertion that Lewis has no right to object to the surrender of these records; and that the records belong to the State and at page 8, paragraph 1, line 6, Respondent says the records are official records.

There is absolutely no substance to the foregoing assertions and the cases so show.

In *Wilson*, he asserted the plea against self incrimination as the basis for his refusal to surrender the books which belonged to the United Wireless Telegraph Company — *Wilson was not summoned or subpoenaed to produce the books* — the subpoena ran against the Telegraph Company — it was merely served on Wilson —

he appeared with the books, but refused to surrender them. He was charged with contempt and convicted and, finally, habeas corpus was denied — Wilson claimed the books would incriminate him — the corporation, directors, approved the surrender of the books. An important factor is that the books were ordered produced by the corporation under a subpoena which created a duty to do so. Incidentally, a subpoena affords due process and an opportunity to quash it.

The *White* case, supra, also involved the plea against self-incrimination under the Fifth Amendment to the U. S. Constitution. The Grand Jury was investigating a Union — a Grand Jury subpoena was issued, addressed to the Union and served on it by service on the president. White showed up with the Union's books and objected to their delivery to the Grand Jury on the ground that such might incriminate him. It is interesting to note what the Court said at page 697 of 322 U. S., 88 L. Ed. 1545, as to what is the only issue in the case, and it is:

> "*The only issue in this case* relates to the nature and scope of the constitutional privilege against self incrimination."

No subpoena had been issued against White.

The foregoing shows these cases are not applicable to the case at Bar.

A sufficient reason for their inapplicability to this case is that there is no similarity in the operation and applicability, breadth and scope of due process of law under the Fifth Amendment and the privilege against self-incrimination under that Amendment. Self-incrimination is a personal privilege to be exercised by the person himself.

Due process of law is a limitation upon the legislative, executive and judicial branches of the Government. It is self-operating and self executing.

Respondent appears to assert what we think is one of the most frivolous ideas we have ever heard of when he seems to say that Lewis can "raise" only any objections which the State may have — and these records belong to the State." What Respondent is really trying to do is to say that Lewis cannot defend this 1974d lawsuit. The State is not a party to this lawsuit and cannot be made a party. The Attorney General of the United States under said Title III has no power or authority to sue the State of Mississippi under 1974d or any other portion of said Title III. This fantastic idea which Respondent grasps at is so unsubstantial we hesitate to dignify it with a response. We do respond to it because if we don't, somebody might think we do not *disagree with it.*

Among the reasons why Lewis can defend this lawsuit is that 1974d authorizes her and only her to be sued in connection with the Respondent's efforts to try to inspect and reproduce the records which he could not do and cannot do without a court order. Respondent is here saying that a person who a statute authorizes to be sued can't defend the lawsuit brought against her pursuant to that statute. If anyone ever gave serious thought to that kind of a proposition, they would immediately know that it is contrary to the *Windsor* and *Hovey* cases and contrary to every principle of law in the United States. Furthermore, it probably would rise to the dignity of a Bill of Attainder or Pains and Penalties — 1974d shouldn't be permitted to be placed in that catagory.

Furthermore, we cannot think of a more gross violation of due process under the Fifth Amendment than to say that Mrs. Lewis, we are given a right to sue you under 1974d, but you can't defend the lawsuit.

Incidentally, in her petition, Lewis asserted that in addition to all of the other rights she had to defend the lawsuit, she could do so as a bailee for hire of said records—Respondent has not denied this.

We deny that these voter records belong to the State of Mississippi. If Plaintiff asserts that then why doesn't Respondent try to bring a suit against the State of Mississippi under Title III? Petitioner does not think he would ever put himself in that position — Respondent could not even sue the State of Mississippi under the 11th Amendment to the U. S. Constitution under the diversity provisions of the Constitution and statutes — what does Respondent do with the requirement of jurisdictional amount? — I assume he is a citizen of Massachusetts.

Respondent is evidently quite worried and disturbed about the fact that a violation of 1971a or 1971b can be prosecuted by the Attorney General on his own initiative and under his own power without a Grand Jury indictment for a violation of Title 18, USCA, Section 242.

Respondent has asserted that the records are official records. If he thinks that helps him in trying to defeat Petitioner's right to defend this 1974d suit, he should inquire around in Washington where he can readily find exclusive of Security records, a whole lot of official records which not too many people have an opportunity to look at and who would certainly have the power to defend any suit involving those records, even though there was no statute in existence comparable to 1974d.

There comes to our mind many records of this Supreme Court, the Executive Department and other departments, which are not open to any except those who the possessor thereof chooses to permit to inspect and/or copy them.

As we read and understand Respondent's brief in opposition, he does not raise, does not assert and does not content that the voter records involved are "public records" — Respondent is quite correct in not raising or asserting that point for, of course, in this State, those records are not public records; a court cannot make records public records, even though they be official records. That can be done solely and alone by the State Legislature. Such records are not public records in Mississippi. We congratulate Respondent for not making or asserting the claim that said records are public records in Mississippi; he is due this compliment for realizing that fact and not asserting them to be public records. If anyone thinks that what Respondent has said in his opposition constitutes an assertion that said records are public records, and if such is taken seriously, then we humbly ask the Court to give us an opportunity to respond thereto before any determination is made on such assertion.

A SERIOUS QUESTION OF JURISDICTION OF THE DISTRICT COURT, THEREFORE OF THE FIFTH CIRCUIT AND OF THIS COURT IS PROMINENT IN THIS CASE.

We have fully covered this point in the opening portion of our "Statement of the Case" at pages 11-14 thereof.

We submit that before a Federal District Court can have jurisdiction of any judicial proceeding, it must

be and constitute a case or controversy; see foregoing portion hereof and Ps. 10-12 of Lewis's petition and the cases of *Muskrat* and *Tuten*, in Lewis petition.

If this be true, we think that if, as and when the case or controversy *ceases to exist* in that which began as a case or controversy, *then at that point jurisdiction ceases.* In the case at Bar, that point was reached, if *Kennedy vs. Lynd*, supra, be accepted by this Court, prior to the issuance of the order or judgment of the District Court (App. 2 to Lewis's petition — A8-10).

FURTHER COMMENT UPON CASES RELIED UPON BY RESPONDENT (RESP. BR. IN OPP. P. 9), BRUCE, KENNEDY VS. LYND, DINKENS AND COLEMAN; AND FURTHER DISTINGUISHING THOSE CASES FROM LEWIS.

The above cases are cited and relied upon by Respondent in his brief in opposition at page 7, paragraph 2 thereof — *they do not help him.*

At pages 20-22 of Lewis's reply to Respondent's brief in opposition to the issuance of the writ of certiorari, we gave some differences and distinctions between the case at Bar and those said cases. We now proceed to make further comment upon said cases relied upon by Respondent and to give further points of difference and distinction between them and this, the Lewis case.

Kennedy vs. Bruce, 298 F. 2d 860, 863 (CA5) — this case has no application to the case at Bar. It was decided in the District Court and in the Fifth Circuit upon only a motion to dismiss. Such motion of Bruce with some supporting affidavits — *but no motion* for a *summary judgment* or a *judgment on the pleadings*

was asked by either party and the rule or rules thereasto were not applied by either Court.

If Bruce were to be relied upon in the case at Bar, then the District Court in Lewis and the Fifth Circuit should have dismissed the complaint and granted no relief whatever to Kennedy against Petitioner because Bruce holds that the filing of a 1974d proceeding says and holds at page 863 of the opinion, first sentence in last paragraph of lefthand column, as follows:

> "The procedure established under Title III of the Civil Rights Act, under which the Attorney General proceeded in the District Court, does not amount to the filing of a suit of any kind. This we decided in State of Ala. vs. Rogers, supra."

Therefore, if a 1974d suit does not amount to a "suit of any kind", there is no jurisdiction in the District Court or the Fifth Circuit under Article III, Section 2, of the Federal Constitution. Furthermore, if that is what the Fifth Circuit held several years previously in Crum Dinkens (the same as Ala. vs. Rogers), then any judicial vitality which anyone thinks should attach to Crum Dinkens is totally destroyed. Article III, Section 2, of said Constitution was not raised nor any question thereon involved in either of said cases. No petition for certiorari was ever filed in Bruce.

Kennedy vs. Lynd, 306 F. 2d 222, 226 (CA 5), cert. den. 371 U. S. 952. In our petition, we said Kennedy vs. Lynd had no judicial vitality because nothing was decided in the District Court which affects this Lewis case in any shape, form or fashion. The District Judge merely opined, and ordered that he would not consider either the complaint or any motions filed by the defendant in that Lynd case because the complaint had been

abandoned by Kennedy by virtue of his having filed and secured certain documents under a Rule 34 in *U. S. vs. Lynd*, 301 F. 2d 818, 822.

Such orders of the District Court are made Appendices 10 and 11 to Lewis's petition for certiorari and appear at pages 37-40 thereof (includes both the opinion of the Court and the order remanding the case to the files).

In *Kennedy vs. Lynd*, the answering stage was never reached and the record in the District Court and the Fifth Circuit which exists in this, the Supreme Court, as No. 576, October 1962 Term, shows the foregoing:

Thus, the only question before the Fifth Circuit upon the Record was whether the District Court did or did not err in remanding the case to the file. *However, in utter and total disregard of the restrictions upon its Appellate jurisdiction and in violation of and in conflict with decisions of this Court, other Circuits and even of its own Circuit, the Fifth Circuit proceeded to exercise original jurisdiction and held, decided and passed upon matters that had never been submitted to the District Court and on which it had never made any decision, insofar as anything applicable to this, the Lewis case now before this Court.* There were not and could not be issues of fact in Kennedy vs. Lynd.

Alabama ex rel. Gallion vs. Rogers, 187 F. Supp. 848, 854, (M. D. Ala) affirmed sub nom *Dinkens vs. Attorney General*, 285 F. 2d 430 (C.A. 5), cert. den. 366 U. S. 913. (We refer to this case throughout the petition for certiorari and this reply as Dinkens or as Crum Dinkens).

In our comment upon *Bruce*, supra, we show an additional reason why Dinkens is not applicable to or persuasive upon this Court in this Lewis case now before this Court. In addition thereto, we submit the following:

If as said in Bruce, Dinkins holds that the 1974d proceedings is not "a suit of any kind", then there was no jurisdiction to grant any relief to Kennedy in the District Court or in the Fifth Circuit and the case should have been dismissed for lack of jurisdiction under Article III, Section 2, of the Federal Constitution.

The due process of law clause of the Fifth Amendment was mentioned in Dinkens but the Record thereof in the District Court as printed for the Fifth Circuit and as filed here in this Supreme Court shows that due process was never argued in the District Court and never seriously or really briefed in the Fifth Circuit or this, the Supreme Court.

Furthermore, as heretofore shown, both parties announced to the District Court, as shown by the Record, supra, that neither had any evidence to produce — thus, it is clear that even though there was an answer filed in Dinkens by him and the other registrars involved, his statement that he had no evidence to produce would unquestionably negate or have the legal effect of nullifying or probably withdrawing his answer and any denials therein.

Furthermore, Dinkens shows from the Record in this Court as above mentioned, that as before this, the Supreme Court, Dinkens had been mooted before the filing of the petition for certiorari therein because the records had been inspected prior to the filing of such petition.

Thus, there were no issues of fact in Bruce and could not have been because no answer was filed.

Coleman vs. Kennedy, 313 F. 2d 867 (CA 5), Cert. den. 373 U. S. 950.

Further, as to this case, we say thus:

The announcement at page 77 of the Record in Coleman, as printed for the use of the Fifth Circuit, and as filed here on the petition for certiorari appears the statement that neither party had any evidence to offer negated the existence of any question of fact existing before the District Court and this Supreme Court — thus, constituting either an abandonment or withdrawal of the answer of Coleman denying the allegations of Kennedy's complaint therein by which he alleged the reasons why he was entitled to an order of the District Court compelling Coleman, to do that which he was not otherwise required to do, to make the records available to Kennedy — thus, there could not have been an issue of fact before the District Court or this Court, the District Court decision would have been the same however because in Coleman, supra, the District Judge followed Kennedy vs. Lynd, thus the latter is mortally infected with the same lack of judicial validity which we say kills Kennedy vs. Lynd as any precedent or holding.

RESPONDENT PERSISTS IN SEEKING TO ERRONEOUSLY MAKE THIS CASE NOW BEFORE THIS COURT INTO ONE INVOLVING ONLY THE LETTER OF DEMAND, OR THE DEMAND UNDER SECTION 1974b *INSTEAD OF* MEETING THE CASE AS MADE BY THE RECORD AND LEWIS'S PETITION FOR CERTIORARI AS ONE INVOLVING ONLY THE 1974d JUDICIAL COURT PROCEEDINGS AS A CASE OR CONTROVERSY.

At line 15 from the bottom of page 7 of his brief in opposition, we ask the Court to take special notice of and recognize the significance of these words quoted from said brief in opposition — "And letters worded

identically to this one have been held to be sufficient in" * * *. Then, Respondent recites the above mentioned cases of Bruce, U. S. vs. Lynd, Kennedy vs. Lynd, Dinkens and Coleman, supra. As we understand the above quoted words, they are saying all of the afore cited cases support the sufficiency of the Section 1974b administrative act composed solely and alone of the demand by the letter of demand made under Section 1974b.

As we have frequently said herein, said Section 1974b is not involved in this case in any shape, form or fashion.

To us, this evidences that Respondent persists in trying to make this into a 1974b case dealing only with the administrative act of the written demand or request by Respondent upon Lewis for permission to inspect, etc. said records. THIS IS NOT A 1974 b CASE.

This Court should not permit itself to be persuaded to view this Lewis case now before it upon any basis except that which it actually is, a Section 1974d suit, case or controversy. It is not a proceeding involving the administrative demand act of an executive officer under said Section 1974b — in or as to which, as Petitioner asserts and as Respondent asserts and admits, Respondent cannot adjudicate anything about anything in this case.

If there be anything in Respondent's brief in opposition which is not covered by this reply of Lewis, then we refer the Court to the contents of Lewis's petition for certiorari.

CONCLUSION

In view of the foregoing, we respectfully request the Court to issue the writ of certiorari prayed for by Mrs. Lewis, Petitioner herein.

If there be any points or questions in this cause upon which the Court desires additional memoranda or briefs, we will be glad to comply with the desire of the Court.

Respectfully submitted this 6th day of May, 1964.

WALTER SILLERS, Attorney
Rosedale, Mississippi

JOE T. PATTERSON, Attorney General
of the State of Mississippi

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CERTIFICATE OF SERVICE

I, the undersigned, Dugas Shands, an Assistant Attorney General of the State of Mississippi, one of the Attorneys of Record for Petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby that I have this day mailed, Air Mail, a true copy of the foregoing Reply of Lewis, Petitioner, to Respondent's opposition to the granting of the issuance of the writ of certiorari to the following Attorneys of Record for Respondent: Harold H. Greene and Gerald P. Choppin, Attorneys, Civil Rights Division, Department of Justice, Washington, D. C., and to Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington, D. C. and have this day mailed, air mail, special delivery, forty copies of said Reply of Lewis, Petitioner, to Respondent's opposition to the granting of the writ of certiorari to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D. C., for filing in this cause, all of above documents postage prepaid.

DONE AT JACKSON, MISSISSIPPI, this the 6th day of May, 1964.

DUGAS SHANDS

APPENDIX A

A copy from the chambers of
CLAUDE F. CLAYTON
United States District Judge
Tupelo, Mississippi
8 June, 1962

Post Office Box 252
Honorable Burke Marshall
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

Re: In re Mrs. Walter Lewis
D.C. 1-61
Northern District of Mississippi

Dear Sir:

This will acknowledge receipt of your letter of June 7, 1962, and the copies of the following which were therein enclosed: (1) Motion for Leave to File Petition for Writ of Mandamus; (2) Petition for Writ of Mandamus and (3) Motion to Advance, which you have filed with the Court of Appeals for the Fifth Circuit. I want you to understand that I do not at all object to you or anyone else applying to the Court of Appeals for a Writ of Mandamus against me in this or any other case. However, I was very much surprised, to say the least, at your taking this action in this case for the reasons which I will briefly state.

When I received your letter dated April 11 about this case, I received almost immediately the letter of April 16 from Honorable Dugas Shands, Assistant Attorney General of the State of Mississippi, and promptly there

after I conferred with Honorable H. M. Ray, United States Attorney for the Northern District of Mississippi, to explore with him the condition of my calendar so that we might determine a date upon which the matter could be heard in view of the request for an opportunity to be heard made in the aforementioned Shands letter.

Page 2 When these letters were received, I was sitting at Aberdeen at my regular April Term of Court in which I had calendared cases for trial for every available day there. Even so, there were approximately twenty cases on the call calendar which could not be reached for setting at that term. I was scheduled to and did go to Oxford for my regular May Term there immediately following the last day of the April Term at Aberdeen. I was required at Oxford to calendar cases and other matters through June 4 and at every available opening I was required to go back to Aberdeen to resume hearings in rather massive litigation which involved, among other things, the ownership of a very valuable patent, and I was able to wind up the taking of evidence in that case on Tuesday, June 5. I was able to bring my work to a close at Aberdeen on Wednesday, June 6.

Mr. Ray was familiar with my calendar situation and our first serious discussions with respect to a setting of this matter was concerned with a period of time when he was scheduled to go on fifteen days active duty with the Air Force at the Pentagon. And, I am scheduled to go on fifteen days of active duty for training with the National Guard beginning Sunday, June 24. As I understood Mr. Ray, it was his desire to be present with the representatives from your office at the time of the presentation of the pending aspects of this case to me. And in view of the situation which I have thus outlined briefly, he and I had tentatively agreed that the matter

would be orally presented to me in mid July concurrently with the session of the Grand Jury which we normally have during that month.

[page 3] Upon his return from active duty, I again discussed this matter with Mr. Ray this week, and I was then informed by him that he had discussed it with you briefly in Washington and that he had advised you that the matter would be for hearing in mid July during the time when our Grand Jury would be in session. I got the impression from him that this seemed satisfactory to you. I may have misunderstood him, or he may have misunderstood you. At any rate, let it be said that no one had ever informed me that there was particular urgency of any sort about a hearing on this matter. It is probable that I could have arranged such a hearing at an earlier date than the one tentatively fixed in conference with Mr. Ray. This I would have been glad to consider if request therefor had been made to me.

Again let me say that I have no objection to your application for mandamus to the Court of Appeals. I simply wanted you to have, as apparently you have not had until now, a picture of the situation from my viewpoint.

With best wishes and personal regards, I am

Sincerely,

Claude F. Clayton

CFC:mg

cc: Hon. H. M. Ray
Hon. Dugas Shands
Hon. W. C. Roberts
Hon. W. H. Bizzell